THE FEDERAL EMPLOYERS' LIABILITY ACT.*

I. **The General Power of Congress to Regulate the Relation of Master and Servant.**

II. **State Power and Its Limitations.**

III. **The Federal Acts Considered.**

- A. Text of the Acts and the Amendments Thereto.
- B. Reason, Purpose, and General Nature of Act.
- C. Scope of Act.
- D. Principal Changes Made by Act.
- E. Constitutionality of Act.
- F. Construction of Act.
- G. Operation of Act.
  1. Prospective or Retroactive.
  2. Exclusive or Controlling Operation of Federal Act; Superseding State Law.
  3. Contract, Stipulation, or Device Intended to Defeat Operation of Statute.
  4. When Railroad or Employee Engaged in Interstate Commerce.
- H. Enforcement of Act.
  1. Cause of Action Given by Act.
     a. General Nature; Survival of Action.
     b. To Whom Given.
     c. For Whose Benefit.
  2. Time to Sue and Limitation of Actions.
  3. Jurisdiction.
     a. Of the Federal Courts.
     b. Concurrent Jurisdiction of State Courts.
     c. Removal of Cause.
  4. Venue.
  5. Party Plaintiff.
  6. Declarations or Complaint.
  7. Plea or Answer.
  8. Matters of Defense.
  9. Issues, Proof and Variance.
  10. Dismissal and Nonsuit.
  11. Instructions.
  12. Damages.
  13. Appeal and Error.

8. Matters of Defense.—Contributory Negligence and Assumption of Risk.—The federal act modifies the defense of

*Continued from the November number of the VIRGINIA LAW REGISTER.

contributory negligence where there is negligence on the part of the company, and restricts the defense of assumption of risk where the company has violated any statutes enacted for the safety of the employee;[1] otherwise, under said act, the defense of assumption of risk remains as at common law;[2] and the term "statute," as used in this connection, means any federal statute, and, in the absence of such statute, an employee may assume the risk of injury.[3] The question whether the employee complained of the defective condition of the cars, machinery, or other equipment and continued to use the defective appliance under a promise to repair is for the jury.[4] Under the act, contributory negligence on the part of the plaintiff is not a bar to recovery; but the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employee.[5]

Fellow Servants.—See ante, "Principal Changes Made by Act," III, D, p. 38.

Contract, Stipulation or Device Intended to Defeat Operation of Act.—See ante, "Contract, Stipulation or Device Intended to Defeat Operation of Statute," III, G, 3, p. 64.

Former Judgment as Res Adjudicata.—As to operation of judgment in state court as res adjudicata, see ante, "To Whom Given," III, H, 1, b, pp. 93, 99.

---

1. **Same.**—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331.

2. **Matters of defense—Contributory negligence and assumption of risk.**—Neil *v.* Idaho R. Co. (St. Ct. Idaho, June 4, 1912), 125 Pac. 331.

3. **Same—Violation of statute—Term "statute" construed.**—Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 78 S. E: 494.

4. **Questions for jury—Continuance in service after promise to repair.**—Horton *v.* Seaboard Air Line R. Co. (N. C.), 78 S. E. 494.

5. **Diminution of damages in case of contributory negligence.**—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331. See, generally, as to the defenses of contributory negligence and assumption of risk, ante, "Principal Changes Made by Act," III, D, pp. 38, 40.

Exclusive Operation of Federal Act.—As to defeating recovery under a state law by showing the exclusive operation of the federal act, see ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2, p. 53; "Plea or Answer," III, H, 7, p. 132.

9. Issues, Proof and Variance.—See, generally, ante, "Declaration or Complaint," III, H, 6, p. 125; "Plea or Answer," III, H, 7, p. 132.

Presumption and Burden of Proof.—See ante, "Declaration or Complaint," III, H, 6, p. 125; "Plea or Answer," III, H, 7, p. 132.

As to Pullman employees, express agents running on trains, etc., see ante, "When Railroad or Employee Engaged in Interstate Commerce," III, G, 4, pp. 67, 77

Variance—Right to Recover under Either Act as Evidence May Show Case under One or the Other—Effect of Pleading Wrong Statute.—See, generally, ante, "Exclusive and Controlling Operation of Federal Act—Superseding State Law," III, G, 2, pp. 53, 61; "Declaration or Complaint," III, H, 6, p. 125.

As the federal act supersedes the common law and the statutes of the state only in so far as they affect causes arising in interstate commerce, it has been held that where the plaintiff bases his cause of action upon that act, but the evidence fails to show a right of recovery thereunder, he may still have his case submitted under the state statute, or under the common law, if the pleadings, after rejecting all references to the act, are sufficient to warrant such submission.[6] A variance between the pleading and proof in this respect, however, is not material unless it be of such a character as to mislead the opposite party.[7] In the Georgia Case, so often referred to herein, where the plaintiff

6. **Variance—Right to recover under state or federal law as evidence may develop.**—Jones *v.* Chesapeake & O. R. Co (Ct. App. Ky., Oct. 1, 1912), 149 S. W. 951. See, also, Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332; Ullrich *v.* N. Y., N. H. & H. R. Co. (D. C.), 193 Fed. 768.

7. **Variance not material, when.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

specifically based her cause of action upon the Alabama statute, but the declaration and the evidence showed a case arising in interstate commerce, and therefore within the controlling and exclusive operation of the federal act, it was held that the court might treat all reference to the Alabama statute as surplusage and permit a recovery under the federal act, and that there was no error, or none of which the defendant could complain, in refusing to permit the defendant, after the appearance term had passed, to file an amendment setting up that the case arose in interstate commerce and within the controlling operation of the federal act, such amendment being nothing more than a dilatory plea, going to show that defendant, though it might be liable to the plaintiff for the particular wrong or injury, was liable under a different statute from that sued upon.[8]

Of course where the pleadings and evidence show a case arising in interstate commerce, the federal act is exclusive, and the existence of a right of action under the state law or the common law cannot be claimed. The federal law then becomes the only law under which the action can be prosecuted and a recovery had. It is the law of the case by which the rights of the employee and the liability of the carrier are to be measured.[9] Where, therefore, the plaintiff's petition, as ruled by the state court, states a case under the state statute, but the evidence shows a case arising in interstate commerce and controlled by the federal act, the situation presented is that of the case pleaded not proved, and the case proved not pleaded, and the defendant, having, in proper time, and in the proper manner, raised the objection and called the attention of the court to the fact that the

8. **Same—Erroneous reference to statute treated as surplusage.**—Southern Ry. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086. See, also, Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

9. **Where pleadings and evidence show case under federal act.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. Sh., 57 L. Ed. 703, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651; Cound *v.* Atchison, etc., Ry. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527, 531.

case is controlled by the federal statute, is entitled, after the evidence is in, to raise again the objection that the federal statute must control, and that the plaintiff is not entitled to recover upon the case as proved.[10]

By the same token, where an action brought by a personal representative and based specifically upon the federal act cannot be sustained under that act for the reason that the cause of action, if any, arose before the federal statute went into effect, no recovery can be had upon the action, as brought, under a state law which gives the right of action, not to the personal representative of the deceased, but to his parents, since damages to the estate of a deceased minor for which a personal representative might maintain an action would be a distinct cause of action from damages to his parents resulting from his death and for which the statute gives a cause of action to the parents.[11]

10. Dismissal and Nonsuit.—The declaration in the Federal Act of April 22, 1908, that contributory negligence shall not bar a recovery is equivalent to a declaration that the court shall not direct a nonsuit upon the ground that the plaintiff's own evidence shows him to be guilty of contributory negligence;[12] and this applies of course where the plaintiff sues in the state court and invokes the benefit of the federal act, any state law with respect to contributory negligence or rule of practice to the contrary notwithstanding.[13]

Where the action was originally brought in the state court to enforce an alleged common-law liability, and that court had power, in its discretion, to dismiss the entire action without

---

10. **Where the pleadings clearly present one case and the evidence another.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 57 L. Ed. 651, 653, 33 S. Ct. 651, Mr. Justice Lamar, dissenting.

11. **Same—Where pleadings present case under federal act and evidence shows case under state law.**—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming 173 Fed. 65.

12. **Contributory negligence no ground for nonsuit.**—Horton *v.* Seaboard Air Line Railway, 157 N. C. 146, 72 S. E. 958.

13. **Same—Applies to case in state court.**—Horton *v.* Seaboard Air Line Railway, 157 N. C. 146, 72 S. E. 958.

prejudice, it was equally within its power to dismiss without prejudice to the commencement of a new action under the federal act.[14]

Nonsuit as to One Party in Case of Fraudulent Joinder.—In a railway engineer's action for injuries against his employer and another railroad corporation whose road it had leased, where it appeared that he was assigned for duty, and had for some time been engaged in hauling trains over that part of the lessee's system which included a portion of the lessor's road, that this was being done by the lessee with the consent of the lessor and while operating under the lessor's franchise, that at the time of the injury the engine, defects in which caused the injury, was on a siding connected at both ends with the main line of the lessor's road where it was being oiled and inspected by plaintiff for the purpose of making a trial trip, which could only be done by passing over a portion of the lessor's road, it was held, upon objection that the plaintiff had made a fraudulent joinder of parties defendant and had fraudulently based his action upon the federal act for the purpose of preventing a removal of the cause, that a nonsuit as against the lessor was improperly granted, it being a permissible inference from the facts that the cause of action against it was well laid.[15]

11. Instructions.—The general rules of law relating to instructions which are more favorable to the objecting party than is warranted by the law and the facts in the case applies to actions for injuries brought under the federal act, and a party cannot complain of a failure to instruct under the act where the rules of law, as stated in the instructions given, were more favorable to it than the rules prescribed in the act itself.[16] Thus the

14. **Dismissal without prejudice, when.**—Oliver *v.* Northern Pac. R. (Dist. Ct. E. D. Wash.), 196 Fed. 432.

15. **Nonsuit as to one party in case of fraudulent joinder.**—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

16. **Instructions stating law too favorably to objecting party.**—Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852; Galveston, etc., R. Co. *v.* Averill (Tex. Civ. App.), 136 S. W. 98; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

defendant cannot complain of a failure to instruct under the federal act, which destroys the defense of negligence of fellow servants, where the jury were instructed that plaintiff could not recover if the injuries were caused by a fellow servant;[17] nor of the failure to give the law as to comparative negligence, as laid down in the act, where the charge given permitted a recovery only in the event the jury should find the defendant negligent and the plaintiff free from contributory negligence, the instruction given being more favorable to the defendant than the rule prescribed by the federal act.[18]

On the other hand, instructions in an action by a railroad employee for a personal injury, given on the theory that the action is based on the federal statute, even if erroneous, because not warranted by plaintiff's pleading, are not prejudicial to defendant, unless the rules of liability under such statute are more burdensome than those under the alternative state statute.[19] In the case of Erie R. Co. *v.* Kennedy, the plaintiff's petition described generally the right of action alleged without specifying whether he based it specifically upon the federal or the state statute. The defendant in its answer stated that it was a carrier by rail engaged in interstate commerce, and that the plaintiff was engaged in such commerce at the time of his injury, but insisted at the trial that the case did not fall within the federal act because the petition did not so bring it. The court, however, after the evidence was in, instructed the jury upon the theory that the action was based upon the federal act, and it was held by the Circuit Court of Appeals that without regard to whether the case properly arose under the federal law or the state law, judgment for the plaintiff should be affirmed, the instructions given not being shown to be more burdensome to the defendant than they would

17. Same.—Atchison. etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852.

18. Same.—Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852; Galveston, etc., R. Co. *v.* Averill (Civ. App., March 8, 1911, on motion for rehearing, April 12, 1911), 136 S. W. 98.

19. Same.—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76. 6th Cir., Nov 7, 1911), 191 Fed. 332.

have been had they been given upon the theory that the case arose under the state law.[20]

Instructions upon Assumption of Risk.—In an action brought by an engineer whose eye was injured by the explosion of an unguarded water guage, the engineer by using the engine in that condition assumed the risk of injury, unless he complained to the proper servant of the master and was assured that the defect would be remedied, in which case he was justified in continuing to use the engine for a reasonable length of time; consequently, a charge to that effect, which also informed the jury that he assumed the risk of injury if the defect was so dangerous that a reasonable man would not continue to use the engine, is more favorable to the railroad company than is proper.[21]

A requested instruction upon the subject of assumption of risk is properly refused where it is couched in such general and sweeping terms that it is not calculated to give the jury an accurate understanding of the law upon that subject, or to direct their attention to the particular phase of the case to which it is deemed applicable.[22]

Instructions upon Apportionment or Diminution of Damages.—See post, "Damages," III, H, 12, pp. 146, 151.

Defining Pecuniary Loss or Aid.—See post, "Damages," III, H, 12, pp. 146, 148.

Sufficiency of General Exceptions to Instructions.—Under the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein, a general exception to an instruction dealing at length with the question of the meas-

20. **Same.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

21. **Instructions upon assumption of risk.**—Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 78 S. E. 494.

22. **Same—Too sweeping and general in terms.**—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 654, 33 S. Ct. 654.

ure of damages in a negligence suit does not cover the specific objection that the statement therein that, if the verdict be for the plaintiff, he shall be awarded "such an amount of damages, not exceeding $20,000, as will compensate him for the injury," erroneously conveys to the jury an intimation that a finding that the plaintiff's damages amounted to that sum would be justified by the evidence.[23]

A general exception to a charge, on the ground that it erroneously submitted the case under a federal statute, which was not applicable to the case made by the pleadings, is not sufficient to sustain assignments of error based on specific differences between the rules of liability stated and those prescribed by the alternative state statute.[24]

12. Damages.—Upon Cause of Action Accruing to Injured Employee.—The federal act, says Mr. Justice Lurton, declares two distinct and independent liabilities, resting upon the common foundation of a wrongful injury, but based upon altogether different principles.[25] It plainly declares the liability of the carrier to its injured servant, and if he survives, he may recover such damages as will compensate him for his expense, loss of time, suffering, and diminished earning power.[26] But if he does not live to recover upon his own cause of action, what then? As to causes of action accruing under the Act of April 22, 1908, prior to its amendment by the Act of April 5, 1910, it is settled beyond controversy that the cause of action given by the act to the deceased did not survive his death, and that in an action by his personal representative for the benefit of the persons named in the act, no recovery could be had for the conscious

---

23. Sufficiency of general exceptions to instructions.—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 651, 657, 33 S. Ct. 654.

24. Same.—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

25. Damages—Distinct liabilities created by act.—Michigan Central R. Co. *v.* Vreeland, 33 Sup. Ct. Rep. 192, 193, 227 U. S. 59, 65, 57 L. Ed. —.

26. Damages upon cause of action accruing to injured employee. —Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 65, 33 S. Ct. 192, 57 L. Ed. —.

suffering of the deceased nor for any other item or element of damage for which he might have recovered had he lived.[27]

Now, however, by § 2 of the Act of April 5, 1910, adding § 9 to the Act of April 22, 1908, it is expressly provided that the right of action given by the act to the person suffering injury shall, in the event of his death, survive to the personal representative for the benefit of the persons named in the act, but with only one recovery for the same injury. This amendment clearly contemplates that while there is to be but one recovery for the same injury in cases resulting in the death of the person injured, that one recovery is to be had upon two independent and essentially different causes of action combined into one, and that, in addition to the damages recoverable for the pecuniary loss or injury in the independent cause of action given by the act as it originally stood, the plaintiff is now entitled to recover a further sum upon the cause of action given to the person injured, and which now survives; so that recovery may now be had for the injury and suffering sustained by the deceased, as well as for the pecuniary loss or injury resulting to the beneficiaries from his death. Such, at least, seems to be the logic of the cases.[28]

Upon Cause of Action Accruing upon Death of Injured Employee.—This cause of action is independent of any cause of action which the decedent had, and includes no damages

27. **Same—Damages in case of death—Prior to Amendment of April 5, 1910.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703; Cain *v.* Southern R. Co. (C. Ct. E. D. Tenn.), 199 Fed. 211, 212; Fulgham *v.* Midland Valley R. Co. (C. C. W. D. Ark.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494; Melzner *v.* Northern R. Co. (S. Ct. Mont.), 127 Pac. 1002.

28. **Same—Damages in case of death subsequent to Amendment of April 5, 1910.**—Northern Pac. R. Co. *v.* Maerkl, 198 Fed. 1; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211. See, also, Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703. Contra: Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore, a liability for the deprivation and loss pecuniarily resulting to them from the wrongful death of the decedent, and for that only.[29]

Pecuniary Loss Defined.—A pecuniary loss or damage must be one which can be measured by some pecuniary standard. It is a term employed judicially, says the Supreme Court, "not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."[30] It is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.[31]

By pecuniary aid, or support, is meant not only money, but anything that can be valued in money.[32] It includes, therefore,

---

29. Damages upon cause of action accruing upon death of injured employee.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192, 195; American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224; Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, 57 L. Ed. —, 33 S. Ct. 426; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

30. Pecuniary loss defined.—Michigan Central R. Co. *v.* Vreeland, 33 Sup. Ct. Rep. 192, 196, 227 U. S. 59, 71, quoting Patterson Railway Accident Law, § 401

31. Same—Not dependent upon legal liability to support.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 71, 33 Sup. Ct. Rep. 192, 196; American Railway Co. *v.* Didricksen, 227 U. S. 145, Adv. S., 57 L. Ed. 224, 33 S. Ct. 224; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212.

32. Pecuniary aid or support not limited to money.—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

damages for the loss of the services of the husband, wife or child;[33] and in the case of a surviving wife, compensation for the loss of support and maintenance, or whatever financial bene fit might reasonably have been expected from her husband had he continued alive and uninjured.[34]

When the beneficiary is a minor child, recovery may be had for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.[35] The duty of the mother of minor children being that of nurture, and of intellectual, moral, and physical training, such as when obtained from others must be for financial compensation, it has been held that the deprivation thereof is such a loss as admits of definite pecuniary valuation, provided there be evidence of the fitness of the parent and that the child has been actually deprived thereof.[36] And it has been intimated that in such a case an instruction authorizing recovery for the loss of a mother's "care and advice" would not be erroneous.[37]

On the other hand, damage for pecuniary loss or injury excludes all consideration of punitive elements, such as recompense for grief, wounded feelings of survivors, loss of society, affection, or companionship.[38] Thus the loss to the parents of the society and companionship of a son is not a pecuniary loss,

---

33. Includes damages for loss of services.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192.

34. Compensation to surviving wife for loss of support, maintenance, and financial benefit.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

35. Where beneficiary is a minor child; loss of counsel, care, training, etc.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192, 196; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211; Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div. July 20, 1909), 172 Fed. 684; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

36. Same—Loss of mother's care.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 197.

37. Same—Same.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. —, 33 S. Ct. 192, 197.

38. All consideration of punitive elements excluded.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 33 Sup. Ct. Rep. 192, 196; Ameri-

and therefore is not an element of the damages recoverable in an action brought under the federal act,[39] and it is error for the court to instruct the jury that, in estimating the damages recoverable in an action brought against a railway carrier under the Act of April 22, 1908, for the benefit of the parents of an employee killed in the carrier's service, they may "take into consideration the fact that they are the father and mother of the deceased, and the fact that they are deprived of his society and any care and consideration he might take of them or have for them during his life," especially where there is no allegation of any such loss, nor any evidence relating to the subject, or from which its pecuniary value may be estimated.[40]

In another case the court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings," and that they were to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court then went further, and instructed the jury that, "in addition to that, independent of what he was receiving from the company, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." The Federal Supreme Court held that this threw the door open to the widest speculation, leaving the jury no longer confined to a consideration of the financial benefits which might reasonably have been expected from her husband in a pecuniary way, and in reversing the judgment, said:

---

can R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

39. Same—Loss of society and companionship.—American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224.

40. Same—Erroneous instruction authorizing recovery.—American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224.

"Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonymous with 'support' and 'maintenance,' for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the court erred."[41]

Apportionment or Diminution of Damages in Case of Contributory Negligence.—Under the federal act, the jury, in estimating damages, are required to take into consideration any contributory negligence of the person injured,[42] and the direction in the act, that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employee, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.[43]

Thus in an action for the death of a railroad freight conductor in a collision with a following passenger train on a switch,

41. **"Care" and "advice" of deceased husband not an element of recovery.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 73, 74, 57 L. Ed. —, 33 S. Ct. 192, 197, 189 Fed. 496.

42. **Apportionment or diminution of damages in case of contributory negligence.**—Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211, 212.

43. **Rule of apportionment.**—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 654, 33 S. Ct. 654; Louisville. etc., R. Co. *v.* Wene (C. C. A.), 202 Fed. 887.

where it appeared that decedent was negligent in failing to see that the switch was closed after his train had passed thereon, while the engineer of the following train was also negligent in failing to discover that the switch was open in time to have stopped his train, it was held that the court properly charged that the decedent was guilty of contributory negligence, and that, after the jury had found the amount of damages to which the decedent's next of kin would be entitled in the absence of decedent's contributory negligence, they should abate that sum by the amount they should find represented decedent's proportionate contributory negligence, the Circuit Court of Appeals saying, with reference to such instruction:

"Manifestly, to give effect to the act, it is essential that the relative amounts of damages caused by the negligence of the respective parties should be declared, and we know of no fairer method than that followed by the trial judge in this case."[44]

An instruction that the federal act requires that where the plaintiff has been guilty of contributory negligence, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, is not objectionable because the court further said that such negligence "goes by way of diminution of damages," since this statement must not be regarded as a qualifying one, but merely as intended to repeat the statutory requirement in somewhat different terms.[45]

But the use in the same instruction of the additional words, "as compared with the negligence of the defendant," is improper, the Supreme Court of the United States saying with reference to such instruction:

"But for the use in the second instance of the additional words, 'as compared with the negligence of the defendant,' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence

---

44. Same.—Louisville, etc., R. Co. *v.* Wene (C. C. A.), 202 Fed. 887, 891.

45. Same—Instruction held not erroneous.—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 654, 33 S. Ct. 654.

of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."[46]

Amount of Damages.—No hard and fast rule by which pecuniary damages may in all cases be measured is possible.[47] The rule must differ according to the relation between the parties plaintiff and the decedent, according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled;[48] and in addition, the amount of recovery depends on the age, character, earning capacity, habits, and morals of the deceased, and, in the case of a father, on his care, attention, and solicitude for his children.[49]

A verdict for $15,000 for injury to a brakeman, twenty-four years old, earning $80 to $85 per month, having a life expectancy of thirty-nine and a half years, whose health, prior to the injury, was good, and thereafter poor, who suffered severe pain at the time of the accident and for four or five days thereafter,

46. **Same—Addition of certain words held erroneous.**—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 654, 656, 33 S. Ct. 654, citing Second Employers' Liability Cases, 223 U. S. 1, 50, 56 L. Ed. 327, 346, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44.

47. **Amount of damages—No hard and fast rule.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 196.

48. **Varies according to relation of parties, etc.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 197.

49. **Affected by age, habits, character and earning capacity.**—Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., July 20, 1909), 172 Fed. 684.

and whose right arm was amputated two inches below the elbow, has been held excessive and reduced to $12,000.[50]

In another case it appeared that the deceased at the time of his death was twenty-nine years old, with a life expectancy, if he had been in normal health, of thirty-six years. He was married in 1900 at the age of twenty, and during the succeeding nine years, while apparently industrious, had spent several thousand dollars of his wife's estate and all he had made himself, leaving at his death only $250. Before marriage he taught school, and after marriage did hauling, stacked lumber in a sawmill, worked on a farm a year, and then began braking on defendant's railroad, having contributed to his family, consisting of wife and five children, an average of about $34 a month. During his marriage he had suffered from a bronchial cough, for which he had been confined in a hospital, where it was discovered that one of his lungs was dead, and a physician testified that this condition would greatly shorten his life. It was held that a verdict for $17,545 was excessive, and should be reduced to $6,000.[51]

In still another case the court, after stating the foregoing principles, but without reciting the evidence, reduced a verdict of $10,000 for the death of the deceased to $7,500, taking into consideration the fact that he had been guilty of such contributory negligence as would, independently of the statute, have barred all recovery, and excluding all allowance for suffering which the deceased might have recovered had he survived, the injury having been sustained prior to the Amendment of April 5, 1910.[52]

Where decedent's legs were both mashed off to the knees by being run over by a train, and he was not treated by a physician

---

50. Verdict for $15,000 held excessive here.—Bradbury *v.* Chicago, R. I. & P. Ry. Co., 149 Iowa 51, 128 N. W. 1.

51. Verdict for $17,545 reduced to $6,000 here.— Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., July 20, 1909), 172 Fed. 684.

52. Recovery of $10,000 reduced to $7,500 on account of contributory negligence.—Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211, 213.

for an hour and a half after the injury, and lived for five hours thereafter, suffering great pain, at least until the physician's arrival, and also suffering great mental anguish in contemplation of death, continually begging others to pray for him, it was held that a verdict of $10,000 for pain and mental anguish suffered by him was excessive, requiring a reversal unless reduced to $5,000.[53] This case was reversed on other grounds, however, on a writ of error to the Supreme Court of the United States.[54]

Where the deceased, who was a conductor on a freight train, was killed in the yards by reason of his own negligence while on his way to enter the caboose of his train, which had just been made up, the negligence on his part consisting in his failure to observe or heed the signals of the switch engine, and in walking down the track ahead of the same, no negligence whatever being shown upon the part of the railway company, the court said that a verdict of $35,000 for his death would have been excessive, even if it had been shown that the railroad company was negligent.[55]

Apportionment of Damages among Beneficiaries.—See, also, ante, "For Whose Benefit," III, H, 1, c, pp. 105, 109.

As heretofore noticed, the action given by the federal act is not for the equal benefit of those shown to be entitled to recover, but the recovery, though for a gross amount, is to be apportioned by the jury to each beneficiary according to his or her individual pecuniary loss, and this, says the Supreme Court, will of itself exclude any recovery on behalf of such as show no pecuniary loss, regardless of the relation they may have sustained to the deceased.[56]

---

53. **Verdict for $10,000 for mental pain and anguish reduced to $5,000.**—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

54. **Same—Reversed on other grounds.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874.

55. **Award of $35,000 held grossly excessive in any case here.**—Neil *v.* Idaho, etc., R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331.

56. **Apportionment of damages among beneficiaries.**—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, Adv. Sh., 57 L. Ed. —, 33 S. Ct. 426, 427. Accord: St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App. Dallas, June 22, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1178.

13. Appeal and Error.—In State Courts.—Where the evidence in an administrator's action against a railroad company for damages to the next of kin from the death of a fireman, resulting from defendant's alleged negligence, showed that the train was being run from a point in Arkansas to a point in another state when the accident occurred, but did not show whether it was engaged in interstate commerce, and the defendant asked a peremptory instruction that plaintiff was not entitled to recover for pain and suffering by decedent, it was held that, in view of the evidence, the request for a peremptory instruction was sufficient to raise, on appeal, the question whether plaintiff was entitled to recover for such pain and suffering under the federal act.[57]

From Lower Federal Court to Supreme Court.—That the constitutionality of the federal act was drawn in question by the plaintiff in error in the lower court affords ground for taking the case directly to the Supreme Court of the United States.[58]

Same—Dismissal—Decision of Constitutional Question Pending Appeal.—A writ of error from the Federal Supreme Court will not be dismissed because the constitutional questions which furnished the ground for bringing the case directly to the Supreme Court have, since the allowance of the writ of error, been decided by that court in another case adversely to the plaintiff in error. The constitutional questions which gave the right to carry the case direct to the Supreme Court not having been foreclosed when the writ of error was allowed, that court still has jurisdiction to consider other assignments of error.[59]

---

57. Appeal and error—In State courts.—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, reversed, on other grounds, in 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703.

58. From lower federal court to Supreme Court—Constitutional question.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192.

59. Same—Decision of constitutional question pending appeal as ground for dismissal.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; Norfolk, etc., R. Co. *v.* Earnest, Adv. S., 57 L. Ed. 654, 229 U. S. 114, 33 S. Ct. 654.

From Circuit Court of Appeals—Amount in Controversy.—A writ of error lies from the Federal Supreme Court to review a judgment of a circuit court of appeals which affirmed a judgment of the circuit court, founded upon the Employers' Liability Act of April 22, 1908, where the matter in controversy exceeds $1,000.[60]

Same—Harmless Error.—Holdings of a circuit court of appeals, when affirming a judgment of a circuit court in an action to recover damages for personal injuries, to the alleged effect that the federal act abolished, as to all cases coming under its provisions, the defense of assumption of risk, and that a railroad employee injured in the course of his employment could avail himself of the benefits of the statute, although at the time of the injury he was not actually engaged in interstate commerce, furnish no ground for reversal, where the benefit of the defense of assumption of risk was accorded to the railway company at the trial, and the right of the employee to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce.[61] And where the record shows that there was evidence that the cars on which the accident occurred, and which were being transferred by a switch engine, were loaded with merchandise destined for a port, to be there transshipped to destination in another state, and that the court instructed the jury that the plaintiff could only recover under the Employers' Liability Act of 1908, in case it found that he was engaged in interstate commerce, the Federal Supreme Court will not, in the absence of clear conviction of error, disturb the judgment based on the verdict.[62]

---

60. **From Circuit Court of Appeals—Amount in controversy.**—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135.

61. **Same—Harmless error.**—Seaboard Air Line R. Co. *v.* Moore, 228 U. S. 433, Adv. S., 57 L. Ed. 580, 33 S. Ct. —. See, also, ante, "Instructions," III, H, 11, p. 143.

62. **Judgment not disturbed in absence of clear conviction of error.** —Seaboard Air Line R. Co. *v.* Moore, 228 U. S. 433, Adv. S., 57 L. Ed. 580, 33 S. Ct. 580.

Same—Penalty on Affirmance.—The judgment of a circuit court of appeals, affirming a judgment of the trial court in a negligence action, on the ground that, though the evidence was conflicting, that for the plaintiff was sufficient to sustain the verdict in his favor, will be affirmed with ten per cent damages where the Supreme Court concurs in this view, and there is no question of law involved.[63]

From State Court of Last Resort to Supreme Court of United States—Federal Questions.—While it is not necessary to plead the federal act, an alleged right thereunder, not specially set up in the state court and there passed upon, cannot be considered by the Federal Supreme Court on writ of error to the state court.[64] A federal question must be deemed to have been presented with sufficient clearness, however, to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised and decided it.[65] Thus the objection that a carrier, sued for the death of an employee, was estopped to rely upon the Federal Act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to the state court, where the latter court held that the federal question was sufficiently raised and decided it.[66] Moreover, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and as he relied upon the state law, the defendant had no choice if it was to defend upon the facts.[67]

---

63. Penalty on affirmance.—Texas, etc., R. Co. *v.* Prater, 229 U. S. 177, 57 L. Ed. 637, 33 S. Ct. 637.

64. From state court of last resort to Federal Supreme Court—Federal questions.—Chicago, etc., R. Co. *v.* Hackett, 228 U. S. 559, Adv. S., 57 L. Ed. 581, 33 S. Ct. 581.

65. When federal question sufficiently presented.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703.

66. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703.

67. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702; 57 L. Ed. 703, 33 S. Ct. 703.

The contention of a defendant railway company, sued in the state courts under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908, and that, if liable, it was liable only to his personal representatives, and not to the plaintiffs—present federal questions which, when decided by the state court, will support a writ of error from the Federal Supreme Court.[68]

---

68. Contention that case controlled by federal act sufficient to support writ of error, when.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651.